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No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1945

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 29) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 50) is reported in 147 F. 2d 136.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 24, 1945 (R. 52). The petition for a writ of certiorari was filed on April 16, 1945, and was granted on May 28, 1945

(R. 53). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a federal district court has jurisdiction of an action brought by the Alien Property Custodian against an executor and resident heirs to determine the interest he has acquired by virtue of an order vesting the right, title and interest of alien enemy legatees, the will having been admitted to probate in a state court but no adjudication having been made with respect to devolution of the estate.

STATUTES INVOLVED

The pertinent provisions of Section 24 (1) of the Judicial Code, as amended (28 U. S. C. 41 (a)), and of Sections 5, 7, 9, and 17 of the Trading with the Enemy Act, as amended (50 U. S. C. App. 1–31), are set forth in the Appendix *infra*, pp. 34–38. The relevant provisions of Executive Order No. 9193, are also set out in the Appendix, *infra*, pp. 38–40.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 2, 7). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942 (R. 3, 6–7) in the Superior Court of the City and County of San Francisco. She purported to leave her entire estate, comprised of

real and personal property, to four heirs-at-law, all residents and nationals of Germany (R. 3, 6, 8, 10). On December 30, 1942, six other heirs-at-law, residing in the United States, filed in the Superior Court a petition for determination of heirship (R. 7–9), claiming that under the provisions of California Statutes, 1941, Chapter 895,[1] the German legatees were ineligible as beneficiaries and that the American heirs should therefore inherit. There has never been a hearing on this petition.

On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762 (R. 10) by which he vested in himself all right, title and interest of the German legatees in the estate of Alvina Wagner. On April 6, 1943, the Custodian brought this action in the District Court of the United States for the Northern District of California against the executor and the six California claimants (R. 2). He sought a judgment determining that the resident claimants have no interest in the estate; that the Custodian is en-

[1] The statute purports to limit inheritance by nonresident aliens to nationals of countries which grant reciprocal rights to American citizens. There are similar statutes in Arizona, 3 Ariz. Code (1939), Sec. 39–111; Montana, Laws of Mont. (1939), ch. 104, p. 219; Nevada, 2 Nev. Laws (Supp. 1931–1941), Sec. 9894; Oklahoma, 60 Okl. St. Ann. (1936), Sec. 121; Oregon, 5 Oregon Comp. Laws Ann. (1940), Sec. 61-107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167 and 177. See also 2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055.

titled to the entire net estate after payment of expenses of administration, taxes, and debts, if any; and that the Custodian is the owner of certain real property, subject to the payment of expenses, taxes, and debts, if any. The Custodian also prayed for inclusion in the judgment of an order to the executor to pay the entire net estate to the Custodian upon the allowance by the state court of the executor's final account. (R. 4–5.)

On May 25, 1943, the defendants filed a motion to strike the complaint upon the ground that the court had no jurisdiction over the subject matter of the action (R. 15), and on July 8, 1943, they filed an answer and a cross-claim, which included a motion to dismiss (R. 18). On July 26, 1943, the Custodian filed a motion for judgment on the pleadings (R. 26). On November 17, 1943, the district court denied the motion to strike the complaint, granted the Custodian's motion for judgment on the pleadings, and ordered entry of a decree granting the relief demanded by the Custodian (R. 27).

The district court held that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 34); that its jurisdiction is derived from the Constitution and laws of the United States and may not be restricted by state legislation (R. 33); that, notwithstanding a grant of the relief sought by the Custodian, "the State probate procedure itself is to be untouched" (R. 37); and that the California reciprocal inherit-

ance statute is invalid because it purports to operate in "the field of foreign relations, a domain reserved exclusively to the Federal government" (R. 37–38).

Accordingly, in the decree, entered on December 28, 1943 (R. 40–42), the district court granted the Custodian's motion for judgment on the pleadings; denied the defendants' motion to dismiss; declared California Statutes, 1941, Chapter 895, invalid; and declared that the Alien Property Custodian had acquired the interests of the German nationals in the estate, that none of the defendants had any right, title or interest, and that the Alien Property Custodian "is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes."

The defendant heirs appealed[2] to the Circuit Court of Appeals for the Ninth Circuit, which reversed the judgment without passing upon the merits of the Custodian's claim, holding that the district court was without jurisdiction of the subject matter of the action (R. 50–51). The opinion, filed on January 24, 1945, states that since "the matter is within probate jurisdiction and that court [*i. e.*, the state probate court] is in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court" (R. 51).

[2] The defendant executor, The San Francisco Bank, did not appeal.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that this suit is within probate jurisdiction and, therefore, not a case or controversy within the meaning of Article III of the Constitution.

2. In holding that this suit would interfere with the state probate court's possession of the property.

3. In holding that Congress had not authorized the Custodian to invoke the jurisdiction of the federal courts for the determination of interests in alien property.

4. In holding that the district court did not have jurisdiction to entertain this action.

5. In ordering the dismissal of the suit.

SUMMARY OF ARGUMENT

I

In order to effectuate his vesting order, the Alien Property Custodian here invoked the jurisdiction of a federal district court under Section 17 of the Trading with the Enemy Act. This Section has long been interpreted as affording an aid to the Custodian in taking summary possession of alien property for the benefit of the United States in time of war. Had the Custodian vested the property itself, as the statute permits, and not merely the interests of the aliens, he could have seized the property here involved without resort-

ing to any judicial tribunal. The decisions of this Court establish that, in this event, the only judicial remedy available to persons claiming to be entitled to the property is a statutory suit in the federal courts. Moreover, if the Custodian had issued an order vesting the property, he could have invoked the jurisdiction of a federal court to enforce it. That he chose to vest only such right, title, and interest as the aliens had in the property does not deprive the federal court of its jurisdiction to take and settle the question of the superior right of the Custodian in the property before the probate court over that of the other claimants. This is so whether the action be deemed *in personam* or *in rem*.

II

Federal jurisdiction over this cause does not rest on Section 17 of the Trading with the Enemy Act alone. The action clearly falls within the ordinary jurisdiction granted to the district courts by the Judicial Code. Under Section 24 (1) of the Judicial Code, district courts have jurisdiction of "all suits of a civil nature * * * in equity" brought by an officer of the United States. Under this Section, the district court had jurisdiction of the Custodian's action unless, as the circuit court of appeals held, it is a probate proceeding or is otherwise an action interfering with the prior jurisdiction of a state court over a *res*.

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An action for the determination of the validity and amount of an interest in a decedent's estate is not a probate matter and is within the equity jurisdiction of the federal district courts. We recognize that a federal court cannot ordinarily acquire *in rem* jurisdiction over an estate to which the *in rem* jurisdiction of a state probate court has first attached. But an action such as this is not *in rem*. The test for the determination of the *in rem* character of an action is whether the relief sought will interfere with such control of a *res* by the state court as is necessary to effectuate that court's jurisdiction. Applying this test, this Court has held actions to be *in personam* when they are brought for determination of heirship or declaration of interests, and although they are coupled with a prayer that the executor or trustee pay over property, render an account, or both. This Court has also held the action to be *in personam* when it has been necessary, in order to grant the relief sought, to establish the priority of payment from the *res* or to establish a trust against the *res*. The circuit courts of appeals, following the decisions of this Court, have held to be *in personam* various actions relating to property under the control of state courts and involving the establishment and foreclosure of a mortgage and orders to account and pay over.

In his prayer for relief, the Custodian assumed that the estate would remain in the hands of the executor until allowance of its final account

(R. 5), and the decree of the district court provided that the Custodian "is entitled to receive" the property after completion of the functions of administration (R. 42). This is relief *in personam*, and not *in rem*, under the established federal rule.

ARGUMENT

I

SECTION 17 OF THE TRADING WITH THE ENEMY ACT CONFERS JURISDICTION OF THIS ACTION ON THE DISTRICT COURT

Section 5 (b) (1) (B) of the Trading with the Enemy Act, as amended, provides for the vesting of alien property "when, as, and upon the terms, directed by the President" (Appendix, *infra*, p. 35), and by Executive Order No. 9095, as amended by Executive Order No. 9193 (Appendix, *infra*, p. 38), the President delegated to the Alien Property Custodian this and other statutory powers.[3] It is well settled that, pursuant to

[3] See also Executive Order No. 9142 (3 Code Fed. Reg. (Cum. Supp.) p. 1148) which transfers from the Department of Justice to the Alien Property Custodian those powers and functions which were exercised during and after the first World War by the then Alien Property Custodian. It is clear that Section 5 (b) (1) (B) comprehends, *inter alia*, the seizure powers granted by Section 7 (c). Appendix, *infra*, pp. 35–36. See H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2–3; S. Rep. No. 911, 77th Cong., 1st Sess., pp. 2–3. For instances of judicial recognition that the principles governing seizure pursuant to Section 7 (c) are applicable to vesting pursuant to Section 5 (b) (1) (B); see *Stern* v. *Newton*, 39 N. Y. S. 2d 593; *The Pietro Campanella*, 47 F. Supp. 374 (D. Md.); *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S. D. N. Y.); *The Aussa*, 52 F. Supp. 927 (D. N. J.).

the statutory authority thus delegated to him, the Custodian may himself determine that property is owned by a foreign national and may summarily vest the property itself instead of vesting only interests in the property. By so doing, he acquires immediate right to possession, leaving all claimants to pursue the remedies provided by Section 9 (a) of the Act (Appendix, *infra*, pp. 36–37)—application for administrative return or suit for return in the federal courts. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. As the Court said in *Stoehr* v. *Wallace*, at pages 245–246:

> * * * There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts * * *

The paramount policy underlying the grant of authority to make such seizures is that there must be no obstacles to the availability of alien property for wartime use in the interest of the United States. The purpose of the Act was "to accomplish a swift, certain, and final reduction to possession of vast quantities of property involved in incredible complications of ownership and

interest." *Kahn* v. *Garvan,* 263 Fed. 909, 917 (S. D. N. Y.).

The adventitious circumstance that the vested property is in process of judicial administration in no way limits this summary power to seize. To the contrary, pursuant to the broad authority granted to the President by the Act, he has, by Executive Order 9193, par. 2 (f) (Appendix, *infra,* pp. 38–39), expressly conferred on the Custodian the power to take such action as he deems necessary, including the power to vest, with respect to "any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision * * * and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof." The Custodian's power to seize the property here involved without resort to a court is thus unassailable.

The uniform practice of the Custodian, where vested property has not been surrendered on request, has been not to take "with the strong hand", but to invoke judicial aid. See *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 568. To this end, Congress has, by Section 17 (Appendix, *infra,* pp. 37–38), empowered him to bring a possessory action and obtain an order for the delivery to him of the property without the trial of adverse claims to it. He need name as party defendant only the possessor of the property. *Cen-*

tral Union Trust Co. v. *Garvan, supra; Stoehr* v. *Wallace, supra; Commercial Trust Co.* v. *Miller, supra.* It "does not seem to need argument to show," said Mr. Justice Holmes, that a demand, entitled to be made by the Custodian, "could be enforced by the District Courts under Section 17." "It cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand." 254 U. S. at 566, 568.

Here the Custodian vested not the property itself but a chose in action or an undetermined interest in the property. Having made this choice, he was authorized, in order to obtain possession, to call on a federal court to determine his interest. *Kahn* v. *Garvan,* 263 Fed. 909 (S. D. N. Y.).

Section 17 of the Trading with the Enemy Act provides that:

> the district courts of the United States are hereby given jurisdiction to make and enter * * * all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court * * *.

This comprehensive language permits no inference which would bar federal jurisdiction simply because the suit brought relates to property being administered by a probate court. In view of the undoubted power of the Custodian to vest

such property itself and to invoke the aid of a federal court in order to get possession, it would be wholly artificial to read such a limitation into Section 17 when the Custodian chooses to vest the right, title, and interest of the alien rather than the *res*.

It is not surprising, then, that the courts have held that the Custodian may invoke the jurisdiction of the federal courts in suits against testamentary trustees and executors brought to establish his interest. Thus, in *Application of Miller*, 288 Fed. 760, the Circuit Court of Appeals for the Second Circuit affirmed an order of the district court requiring an executor under a will admitted to probate in a state court to pay over moneys due to German legatees where the Custodian's order merely called for "every right, title, and interest of said enemy in and to the estate." See also *Kahn* v. *Garvan*, 263 Fed. 909 (S. D. N. Y.); *In re Miller*, 281 Fed. 764 (C. C. A. 2).

To argue that the district court had no jurisdiction under Section 17 to entertain the instant action is to disregard the explicit provisions of the Act and the consistent purport of judicial decisions under it. Having vested the interests of foreign nationals in the property of the estate, the Custodian has brought an action to define those interests. If it be admitted, as it must be, that the Custodian could have vested the property itself, and could have maintained a summary ac-

tion for immediate possession, then it follows, *a fortiori,* that he may bring an action for the determination of what he has vested, bringing in as defendants all known claimants.

The contention (Br. in Opp., p. 5) that the Custodian may not sue for enforcement of his vesting under Section 17, because there has not yet been a decision in the state court that the property devolved to foreign nationals, ignores the decision of this Court in the *Central Union Trust Co.* case, *supra.* It was there established that judicial determination of ownership by a foreign national is not a prerequisite to the custodian's perfection of rights in seized property, and that those rights are defeasible only through exercise of the remedies prescribed in Section 9 (a).

As has been pointed out, if the Custodian chooses to vest the right, title, and interest in certain property, rather than vest a *res* which he has himself defined, he "must submit to some judicial determination between himself, as captor, and the [executor] as obligor * * *." He "might perhaps file this bill in the [state] courts * * *; but it does not follow that he may not file a bill here as well. Section 17 confers on this court general jurisdiction 'to enforce the provisions of' the Trading with the Enemy Act * * *, and if this be a suit ancillary to that purpose the jurisdiction extends so far." Judge Learned Hand, in *Kahn* v. *Garvan,* 263 Fed. 909, 912 (S. D. N. Y.). The judicial determination

in the federal courts, adverted to by Judge Hand, is authorized by Section 17. It is precisely what the Custodian seeks in this action.

II

SECTION 24 (1) OF THE JUDICIAL CODE CONFERS JURISDICTION OF THIS ACTION ON THE DISTRICT COURT

The jurisdiction of the district court here need not be rested on the special provisions of the Trading with the Enemy Act. District courts have general jurisdiction, under Section 24 (1) of the Judicial Code, of "all suits of a civil nature * * * in equity, brought by the United States, or by an officer thereof authorized by law to sue * * *." The Alien Property Custodian is an officer of the United States authorized by law to sue. The action is within the jurisdiction of the federal courts, unless, as suggested by the court below, it is a probate proceeding which is not a case or controversy within the meaning of Article III of the Constitution or unless it interferes with the probate jurisdiction of the California court.

A. *This suit is not a probate proceeding.*— That there is no federal jurisdiction over the probate of a will is clear. *Case of Broderick's Will,* 21 Wall. 503. But the Custodian is seeking neither probate of the will nor any interference with the probate proceedings or with the administration of the estate under the control of the state court. What he seeks here is a declaration

of his interest in the estate. Such a declaration is not a probate matter and is within the jurisdiction of the district courts. *Byers* v. *McAuley*, 149 U. S. 608; *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; *McClellan* v. *Carland*, 217 U. S. 268; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613. See *Sutton* v. *English*, 246 U. S. 199, 205; *Princess Lida* v. *Thompson*, 305 U. S. 456, 467.

The comprehensive review of the decisions prior to 1909 in Mr. Justice Day's opinion for the Court in *Waterman* v. *Canal-Louisiana Bank Co.*, *supra*, reveals constant adherence to the principle that, though the federal court lacks jurisdiction "to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate", it has jurisdiction "to determine and award by decree binding *in personam* * * * shares in * * * estates". 215 U. S. at 45. This is part of the "established equity jurisdiction of the Federal courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789". 215 U. S. at 43.

In the course of holding that an action to annul a will is a probate proceeding outside the jurisdiction of a federal court, this Court said, in *Sutton* v. *English*, 246 U. S. 199, 205, that:

> * * * questions relating to the interests of heirs, devisees, or legatees * * * which may

> be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy.

That the action is brought against the executor of the estate does not make it a probate proceeding. Suits against executors and administrators are clearly within federal jurisdiction "when instituted in order to determine the validity of claims against the estate or claimants' interests therein." *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619.[4]

B. *This suit does not interfere with the* in rem *jurisdiction of the state probate court.*—The Custodian has not denied that probate proceedings in the California Superior Court are *in rem* or that the state court must have control of the *res* in order to complete those proceedings. Cf. Br. in Opp. p. 5. But he does contend that this action in the federal district court is not *in rem* since the relief sought can be granted without any interference with the *res*. The Custodian here sought only a determination of his interest "after payment of expenses of administration, inheritance

[4] Even if a state statute purports to confer exclusive jurisdiction over determinations of heirship in a probate court, a federal equity court may exercise its jurisdiction in favor of creditors, legatees, and heirs to establish their claims. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43.

and estate taxes, if any, and debts of the decedent", and an order that "the defendant executor * * * pay the entire net estate to the plaintiff upon the allowance of its final account as executor." (R. 5.) Ouster of the state court's jurisdiction was not suggested; on the contrary, the Custodian expected to lay his adjudicated interest before that court and ask it for distribution. As the district court stated (R. 37), "The State probate procedure itself is to be untouched."[5] Indeed, the decree of the district court did not order the executor to pay, but merely recited that (R. 42):

> The plaintiff is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, an dtaxes.

Thus, even if the court below, despite abundant authority to the contrary (see *infra*, pp. 20–21), thought that the complaint was *in rem* because an order of payment was sought, the decree actually entered included no such provision and

[5] The law of California is in accord. In *Dickerman* v. *Ahern*, 93 Cal. App. 166, the plaintiff filed a creditor's bill in a state court seeking to subject to his claim the balance after exoneration of certain bonds deposited by the defendant with the United States district court as bail for his brother. The court, although recognizing the principle that one court would not issue process against the officers of another, held that that principle did not apply, for there was no attempt to obtain such process, the plaintiff seeking only a declaration of his right to whatever might remain of the bonds after the district court was finished with them.

should have been upheld. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 45; *Lubbock Hotel Co.* v. *Guaranty Bank & Trust Co.*, 77 F. 2d 152, 155 (C. C. A. 5).

The circuit court of appeals relied upon the principle that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of all other courts (R. 51). But that principle "has no application to a case in a federal court * * * wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court." *Princess Lida* v. *Thompson*, 305 U. S. 456, 466. It applies only where the action in both courts is *in rem* or *quasi in rem*, so that each court, in order to grant the relief sought, must control the *res*. *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477.

The applicable doctrine was clearly outlined by this Court in *United States* v. *Klein*, 303 U. S. 276. In that case, money had been paid into a federal court for unknown beneficiaries of a class suit. The Escheator of Pennsylvania, after a lapse of time, applied to a state court and secured a declaration of escheat of the funds. In upholding the jurisdiction of the state court to make the declaration, the Court said (pp. 281–282):

> While a federal court which has taken possession of property in the exercise of

> the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as the restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. [Citations.] Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. [Citations.] Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. [Citations.]
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> * * * At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund * * * and to confirm the authority of appellee to make claim to the moneys.

The leading case in this field, *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, was a suit in a federal court by an out-of-state heir-at-law against the executor and certain beneficiaries of a will. Prayer was made for a declaration that a certain legacy had lapsed and that the property had devolved to the plaintiff, for an order that the executor pay over the property, and for a general accounting. This Court held

the action to be *in personam*. An accounting under the supervision of a federal court, it said, would interfere with the jurisdiction of the state probate court, but, as for the balance of the relief requested (215 U. S. at 46):

> The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally.

This Court has also held to be *in personam* a suit against a testamentary trustee for a declaration of interest and an order directing the trustee to account and pay over. *Mandeville* v. *Canterbury*, 318 U. S. 47. Accord: *Cottingham* v. *Hall*, 55 F. 2d 664 (C. C. A. 4); *Vacuum Oil Co.* v. *Land Title Guaranty & Trust Co.*, 80 F. 2d 476 (C. C. A. 6). And a suit against a state bank liquidator has been held to be *in personam* even where, in addition to establishing the plaintiff's right to receive the money claimed, the court de-

clares a trust therefor against the *res*. *General Baking Co.* v. *Harr*, 300 U. S. 433.

An action in a federal court brought by a receiver of a national bank, appointed by the Comptroller of Currency, against a mortgage pool trustee, appointed by a state court, has also been held to be *in personam*. *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613.* In sustaining the district court's jurisdiction to determine that the plaintiff was entitled to certain payments out of the *res* under the jurisdiction of the state court and to declare that such payments were entitled to priority, the Court compared the situation to the control "exercised by probate courts over such fiduciaries as guardians, administrators, executors, etc." and said, at pp. 619–620:

The jurisdiction of federal courts to en-

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* While *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, established that an accounting under the supervision of the federal court would interfere with the *in rem* jurisdiction of a state probate court, there is language in *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 618, which looks the other way. See also *Cottingham* v. *Hall*, 55 F. 2d 664 (C. C. A. 4). These decisions of this Court were reconciled in *Hegarty* v. *Hegarty*, 46 F. Supp. 319, 320 (D. Mass.): "The federal courts have taken jurisdiction of suits seeking personal judgments against fiduciaries where no accounting—a matter for the probate court—has been sought (*Waterman* v. *Canal-Louisiana Bank & Trust Co.* * * *) and also where an accounting has been sought which did not affect the *res*. *Commonwealth Trust Company of Pittsburgh et al.* v. *Bradford* * * *." In any event, resolution of the issues raised by the case at bar does not call for a reconciliation of the foregoing decisions since no accounting in the federal courts has been requested.

> tertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interest therein. Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. * * *
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> * * * The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment *in personam* was rendered.

The Bradford case is of particular significance here since, unlike most of the cases involving this doctrine which have arisen, federal jurisdiction did not rest on diversity of citizenship, but rather on the ground that the suit, like that at bar, was instituted by an officer of the United States under Section 24 (1) of the Judicial Code. See Appendix, *infra,* p. 34. That the suit is brought by the United States or one of its officers does not deprive a federal court of a jurisdiction which it clearly would have if the suit had been instituted by a nonresident on diversity grounds. *Pufahl* v. *Estate of Parks,* 299 U. S. 217, 225–226; *United States* v. *Peoples Trust and Savings Company,* 97 F. 2d 771, 773 (C. C. A. 7).

Decisions of the circuit courts of appeals, in a variety of factual situations, further confirm the conclusion that this is an action *in personam*. In *Lubbock Hotel Co.* v. *Guaranty Bank & Trust Co.*, 77 F. 2d 152, the Circuit Court of Appeals for the Fifth Circuit upheld federal jurisdiction of a suit to foreclose a mortgage against property in the hands of a receiver appointed by a state court. To preserve the *in personam* nature of the action, the court held that the mortgagee would have to apply to the state court for process to enforce the foreclosure, and ordered modification of the decree of the trial court (p. 155), because that part of the decree which undertook

> * * * completely to direct and control the foreclosure proceedings to be had in the state court, including the making of the allowances against the proceeds, and in effect reserving jurisdiction to proceed with the foreclosure, if the state court did not, * * * would completely oust the state court of effective possession and jurisdiction over the property in its custody, and make it a mere ministerial agent of the federal court.

And the Circuit Court of Appeals for the Seventh Circuit has held an action by the United States against an executor for income taxes owed by the decedent to be *in personam*, saying (*United States* v. *Peoples Trust & Savings Company*, 97 F. 2d 771, 774):

> Here the only relief sought and all that could be obtained is the determination of the validity and amount of the tax claims against decedent's estate. A judgment obtained could not in any way interfere with the orderly process of the administration of the estate in the State Court, or deal with the *res* of the estate or its orderly distribution.

See also *Miami County National Bank* v. *Bancroft,* 121 F. 2d 921 (C. C. A. 10), and *Blacker* v. *Thatcher,* 145 F. 2d 255, which, although indistinguishable from this case, was decided by the court below in accordance with the doctrine established by the foregoing authorities.

The cases in which federal jurisdiction has been denied on the ground that the action in the federal court was *in rem* and interfered with the previously acquired *in rem* jurisdiction of a state court are readily distinguishable. The respondents rely chiefly upon *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 463, in which the United States, as assignee of the Soviet Government, sued in a federal court for an accounting and for delivery of the funds of Russian insurance companies, deposited with the New York Superintendent of Insurance and defendant banks under the control of a New York state court. This Court, finding that the relief sought could not be granted without removing the *res,* its administration, and its disposition, from the control of

the state court, concluded that the action was *in rem*. The action was not one "to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court." Instead, the complainant demanded that "the depositaries account and pay over to the complainants, as 'the sole and exclusive owner,' the entire funds in their hands. Thus the object of the suits [was] to take the property from the depositaries and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims [were] being adjudicated in the state proceedings." 296 U. S. at 478.

In the instant case, the petitioner did not seek an accounting in the federal court, but only a determination of his interest; he named as defendants all adverse claimants to the estate known to him (R. 3) and to the other claimants (R. 8). The relief requested by him and granted by the district court could in no way disturb the control of the state court, for both the complaint (R. 5) and the decree (R. 42) contemplated that the petitioner would have to await final distribution by the state probate court. As this Court said in the *Waterman* case, 215 U. S. 33, 44:

> * * * the debt thus established must take its place and share of the estate as administered by the probate court; and it

> cannot be enforced by process directly against the property of the decedent.

Moreover, if on further proceedings in the probate court, other claimants should appear, it is indisputable that the decree of the district court would not bar them from asserting the rights they might otherwise have. (R. 42.)

Princess Lida v. *Thompson*, 305 U. S. 456, was a suit by a beneficiary against trustees of an *inter vivos* trust being administered under the control of a state court. The prayer was for an accounting, removal of the trustees and restoration by them of trust funds alleged to have been lost through mismanagement. This Court, while declaring that "an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res," found that (at p. 467):

> No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

The Circuit of Appeals for the First Circuit, in applying the holding in the *Princess Lida* case, takes it to mean that (*Kittredge* v. *Stevens*, 126 F. 2d 263, 267):

> If the issues presented by the complainant involve a consideration of the actual hand-

ling of the trust property by the fiduciaries, then the federal courts would appear to have no jurisdiction.'

"Actual handling" of an estate is not involved here, the only question being the construction and validity of a state statute. The relief sought, as well as the decree granted expressly left matters of administration to the California court.

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[1] *Kittredge* v. *Stevens* was a suit against an administrator and trustee for property to which the plaintiff claimed to be entitled and for an accounting. The circuit court of appeals held that there was no federal jurisdiction "over a case which would involve an examination of the general administration of four estates by a state probate court." 126 F. 2d at 267.

In *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, the complaint was dismissed for want of equity, no decision being made as to federal jurisdiction. That case was an action by an administrator's surety for the appointment of a receiver, for an accounting, for exoneration of the surety, and for a determination of heirship. There was pending in a state court an action to set aside a probate decree, brought by some of the heirs against an heir-administrator. The surety, fearing dissipation of the property awarded to the heir-administrator under the probate decree, brought his action in the federal court. This Court held that a federal equity court should not create a receivership as an end in itself and that the surety sought no end to which the receivership could properly be an ancillary remedy, because his only interest in the matter was his contingent right of exoneration. As between the real disputants, the heir-administrator and the other heirs, there was no diversity of citizenship and no other ground for federal jurisdiction.

C. *The district court properly exercised its jurisdiction.*—The respondents, relying upon *Pennsylvania* v. *Williams,* 294 U. S. 176, *Gordon* v. *Ominsky,* 294 U. S. 186, and *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 463, contend that even if the district court had jurisdiction, "there is well established authority for its relinquishing its jurisdiction in favor of the natural, orderly and adequate procedure of the state court for the administration of the property of the estate." Br. in Opp., p. 9. But these cases hold only that a federal court of equity should not exercise an unquestioned jurisdiction to oust competent state officers from the entire possession and administration of property in their custody. *Gordon* v. *Washington,* 295 U. S. 30, 39,

Pennsylvania v. *Williams, supra,* involved the liquidation of an insolvent building and loan association. After the appointment of a federal receiver to control the property, the Secretary of Banking of the Commonwealth of Pennsylvania petitioned the district court to order its receiver to turn the property over to him so that he might proceed with the liquidation in accordance with the elaborate statutory scheme provided for that purpose. The court refused and was upheld by the circuit court of appeals. This Court, condemning

usurpation of state administrative affairs by the federal courts, held that a court of equity, having before it a bill for a receivership should, as a matter of sound discretion, have directed the surrender of the *res* to the state officer, "charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent." 294 U. S. at 184. *Gordon* v. *Ominsky, supra,* and *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189, companion cases to *Pennsylvania* v. *Williams,* presented similar situations and were decided on the same principle.

United States v. *Bank of New York & Trust Co.,* 296 U. S. 463, following *Pennsylvania* v. *Williams,* was, as we have already pointed out (*supra,* pp. 25–26), another case in which the exercise of federal jurisdiction would have operated to remove from the state tribunal the entire administration of a *res.* In that case, moreover, numerous claimants before the state court had not been made parties to the federal suit, and this Court said that "this fact in itself would be a sufficient reason for the District Court to refuse to proceed in their absence." 296 U. S. at 480. That, of course, is not the situation here.

Commonwealth Trust Co. v. *Bradford,* 297 U. S. 613, establishes the inapplicability here of the rule

of *Pennsylvania* v. *Williams*. Holding a receiver of a national bank to be entitled to certain payments out of a mortgage pool being administered by a state court, the court sustained a decree establishing his right to prior payment out of the fund. Of *Pennsylvania* v. *Williams*, the Court said (pp. 619–620):

> The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in *Pennsylvania* v. *Williams*, * * * is not applicable. [There] we found conflict between the federal court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the federal court should retain jurisdiction; its power generally to render judgment *in personam* against fiduciaries appointed by state courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment *in personam* was rendered.
>
> Congress has empowered Receivers of National Banks to sue in federal courts; the

obvious importance of permitting them freely to do so cannot be disregarded.

The decree of the district court in this action affected the administration of the *res* in the hands of the state court no more than did the decree in *Commonwealth Trust Co.* v. *Bradford.* It merely adjudicated the petitioner's interest in the property as against the claimant heirs. Matters properly appertaining to administration—payment of expenses and taxes, the accounts of fiduciaries, and the final distribution of the estate—were left under the supervision of the state court. The entire action was premised on the supposition that the probate court would fully exercise its jurisdiction.

Issues of state law are concededly present in this case but this alone does not justify a declination of federal jurisdiction. *Meredith* v. *Winter Haven,* 320 U. S. 228, 234. It would be wholly inappropriate for a federal court to refuse to hear the federal issue—basic to this case—of the validity, under the Constitution of the United States, of a California statute which, the United States asserts, encroaches upon a domain reserved exclusively to it and fully occupied by the Trading with the Enemy Act and treaties between the United States and other governments (R. 31–40).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed and the case remanded to that court for further proceedings.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

Judicial Code, as amended (28 U. S. C. 41 (1)):

SECTION 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue * * * or, where the matter in controversy exceeds * * * $3,000, and * * * is between citizens of different States * * *.

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. IV, 616):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation

or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

* * * * *

SEC. 7 (c) [as amended, 40 Stat. 1020] If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid

over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 9 (a) [as amended, 41 Stat. 35, 41 Stat. 977, 42 Stat. 1511]

That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other

property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 17. That the district courts of the United States are hereby given jurisdiction

to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

Executive Order No. 9193, amending Executive Order No. 9095 (3 Code Fed. Reg. (Cum. Supp.) p. 1121), provides, in pertinent part, as follows (3 Code Fed. Reg. (Cum. Supp.) pp. 1174–1177):

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or

national thereof. When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian.

* * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive Order.

* * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions here-

under, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

13. Any regulations, rulings, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under sections 3 (a) or 5 (b) of the Trading with the enemy Act, as amended, shall be conclusively presumed to have been issued, made or taken after appropriate consultation as herein required and after appropriate certification in any case in which a certification is required pursuant to the provisions of this Executive Order.

U. S. GOVERNMENT PRINTING OFFICE: 1942